No. 76-1588

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

RUTH McMAHON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

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OPINION BELOW

The oral opinion of the district court (App. A, *infra*, pp. 1a-7a) is not reported.

JURISDICTION

The judgment of the district court declaring portions of Section 202(d) of the Social Security Act unconstitutional as applied to appellee was entered on February 14, 1977 (App. B, *infra*, pp. 8a-9a). A notice of appeal to this Court (App. C, *infra*, pp. 10a-11a) was filed on March 14, 1977. The jurisdiction of this Court is conferred by 28 U.S.C. 1252.

QUESTION PRESENTED

Whether Sections 202(d) and 202(s)(2) of the Social Security Act, which provide that secondary social security

benefits received by a disabled dependent child of an insured wage earner shall terminate when the child marries an individual who is not entitled to benefits under the Act, are consistent with the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Section 202 of the Social Security Act, 49 Stat. 623, as amended, 42 U.S.C. (and Supp. V) 402, provides in pertinent part:

> (d)(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits or of an individual who dies a fully or currently insured individual, if such child—
>
> (A) has filed application for child's insurance benefits,
>
> (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and
>
> (C) was dependent upon such individual—
>
> * * * * *
>
> shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to

> such insurance benefits and ending with the month preceding whichever of the following first occurs—
>
> (D) the month in which such child dies or marries,
>
> * * * * *
>
> (5) In the case of a child who has attained the age of eighteen and who marries—
>
> (A) an individual entitled to benefits under subsection (a), (b), (e), (f), (g), or (h) of this section or under section 423(a) of this title, or
>
> (B) another individual who has attained the age of eighteen and is entitled to benefits under this subsection,
>
> such child's entitlement to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) of this subsection but subject to subsection (s) of this section, not be terminated by reason of such marriage; * * *.
>
> * * * * *
>
> (s)(2) * * * [S]o much of subsection[ ] * * * (d)(5) * * * of this section as precedes the semicolon, shall not apply in the case of any child unless such child, at the time of the marriage referred to therein, was under a disability * * *.

STATEMENT

1. Under Section 202(d) of the Social Security Act, 49 Stat. 623, as amended, 42 U.S.C. (and Supp. V) 402(d), child's insurance benefits are provided to the dependent children of wage earners who receive old-age or disability benefits or who have died fully or currently insured under the Act. To be entitled to child's insurance benefits, the dependent child at the time of his application must be unmarried and either under 18 years of age (or a full-time student under age 22) or under

a disability which began before he attained age 22. Section 202(d)(1)(B) of the Act.

Section 202(d)(1)(D) of the Act provides that child's insurance benefits shall terminate when the child marries. There is, however, a limited exception to this general provision for a disabled child (who has attained the age of 18) who marries an individual also entitled to one of several categories of insurance benefits under the Act. Sections 202(d)(5) and 202(s)(2) of the Act.[1] Such a marriage does not terminate the disabled child's entitlement to benefits. Section 202(d)(5). But a disabled child who marries an individual who is not entitled to benefits under the Act falls outside the exception; that disabled child's benefits, like those of nondisabled children, are terminated by marriage.

. 2. Appellee Ruth McMahon, who is disabled, was awarded child's insurance benefits beginning in November 1960, on the basis of her father's social security account.[2] In May 1962, she married a person who likewise was disabled, but who was not entitled to child's insurance or any other form of benefit under the Act. Because of this marriage, appellee's child's insurance benefits were terminated by the Secretary pursuant to Section 202(d)(1) (B) of the Act.

Appellee's husband died on October 10, 1969. On December 19, 1969, she reapplied for child's insurance benefits. This application was denied on the ground that the statute does not provide for reentitlement to child's benefits upon the termination of a marriage. Cf. Section 202(d)(6).

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[1]Section 202(d)(5) on its face appears to state a general rule applicable to all dependent children, but Section 202(s)(2) narrows the application of that rule to dependent children who are disabled.

[2]The relevant facts of this case are not in dispute and appear in the administrative law judge's decision, dated November 21, 1975, and the decision of the Appeals Council, dated December 22, 1975.

On April 5, 1974, appellee filed this suit for declaratory and injunctive relief, contending that the statutory provisions under which her benefits had been terminated are unconstitutionally discriminatory. In an oral opinion rendered on January 18, 1977, the district court ruled for appellee (App. A, *infra*, pp. 3a-4a):

> The discriminations and irrationalities are not sufficiently great to warrant, in this Court's opinion, striking down the statute. Nevertheless, it's desirable to have a uniformity of applications through the country. In Jobst vs. Richardson, 368 F. Supp. 909 (Western District Missouri, 1974), Judge Oliver * * * declared this provision unconstitutional * * *.
>
> * * * * *
>
> Accordingly, this case follows the Jobst decision and declares the statute unconstitutional as applied in this case and orders the case remanded for further action not inconsistent with this opinion.[3]

The district court noted that *Jobst* is pending on appeal in this Court (*Califano* v. *Jobst*, No. 76-860, probable jurisdiction noted February 22, 1977) and stated that "[t]hat appeal will be decisive in the case before us" (App. A, *infra*, p. 4a).

THE QUESTION IS SUBSTANTIAL

This case presents the same question now before the Court in *Califano* v. *Jobst*, No. 76-860: whether Sections 202(d) and 202(s)(2) of the Social Security Act, which provide that secondary social security benefits received by a

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[3]The court ordered "that [appellee's] child's disability insurance benefits be reinstated retroactive to their termination in May, 1962" (App. B, *infra*, p. 9a), but the court stayed its judgment pending the Secretary's appeal (*ibid.*).

disabled dependent child of an insured wage earner shall terminate when the child marries an individual who is not entitled to benefits under the Act, are consistent with the Due Process Clause of the Fifth Amendment.[4] The Court's disposition of the question in *Jobst* will control this case.

CONCLUSION

This appeal should be held pending the decision in *Califano* v. *Jobst* and then disposed of in accordance with that decision.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

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[4]A copy of the government's brief in *Jobst* is being furnished to counsel for the appellee.

DOJ-1977-05

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RUTH MC MAHON,

Plaintiff,

-against-

F. D. MATHEWS, SECRETARY OF THE U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

Defendants.

74 C 540

United States Courthouse
Brookly, New York

January 18, 1977
9:30 o'clock a.m.

Before:

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

ILENE GINSBERG
Official Court Reporter

THE COURT: The Court has heard full argument in this case and read the excellent briefs on both sides and the full record.

This is a most puzzling and appealing case.

Plaintiff suffered from serious congenital and other defects prior to the time that she was 18 as a result of which she was clearly fully disabled and unemployable.

Under the Social Security Law because of her father, she was entitled to child disability benefits. Following the death of her father, under the statute these child disability benefits terminated upon her marriage.

She married a person who is 100 percent physically disabled under the Veteran's Administration definition of disability.

While the definition of disability for the purposes of the Social Security Law differs from those under the Veteran's administration provisions, it appears to be conceded by all that her husband was disabled under any possible definition of the term.

He had a number of months of eligibility under the Social Security Law, but because of his disablement while in the Armed Forces, he was unable to earn sufficient additional coverage so that upon his death, his wife could recover under the Social Security Laws as much benefits as she would have obtained had he been a fully covered worker.

He had however, because of his Armed Services and other employment, enough benefits for her to qualify for a widow's benefit under the Social Security Act.

She is presently receiving widow's benefits under the Social Security Act due to her husband, of $67 a month and Veteran's Administration benefits of approximately $200 a month.

She now seeks child disability benefits arising from the coverage of her deceased father because her husband is now deceased.

Her child disability benefits would be approximately $200 a month. Offset against these disability benefits of the Social Security Act would be the $67 a month she had received as a widow. Not offset apparently, would be the $200 she would receive and is receiving under the V.A. widow's benefits provisions.

Plaintiff does not press the argument that the statute can be interpreted so as to read the termination provisions as not being applicable in cases of a marriage to a person who, because of his own disability, is incapable of obtaining coverage under the Social Security Act.

The statute is quite clear that even impossibility of this kind does not warrant ignoring its terms requiring cutting off of the child disability benefits upon marriage nor is any argument made that as a matter of statutory interpretation the death of the spouse or any termination of the marriage through divorce or otherwise would remove the bar created by the marriage.

It is obvious that as applied in this case, the statute has a cruel and probably unintended effect.

The Court, nevertheless, recognizes that because of the enormous number of welfare statutes and their peculiar interrelationships and overlaps, "windfalls" and discrepancies occur in a substantial number of cases, see e.g. Liebman, Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare, 89 Harvard Law Review 8933 (1933).

The question before this Court, without any precedent, the position of the plaintiff that the statute is unconstitutional, would be denied. The discriminations and irrationalities are not sufficiently great to warrant, in this

Court's opinion, striking down the statute. Nevertheless, it's desirable to have a uniformity of applications through the country. In Jobst vs. Richardson, 368 F. Supp. 909 (Western District Missouri, 1974). Judge Oliver, in a well reasoned decision declared this provision unconstitutional in a case very similar except that the spousal roles were reversed in sex. This case is even stronger than the Jobst case since the marriage has now been terminated.

Following the Jobst decision, the Court is informed that the matter was amended to the Supreme Court which remanded it for further reconsideration by the District Court.

The Court is further informed that upon reconsideration, the District Court reaffirmed its opinion in the decision and the matter is now before the United States Supreme Court on appeal. That appeal will be decisive in the case before us.

Accordingly, this case follows the Jobst decision and declares the statute unconstitutional as applied in this case and orders the case remanded for further action not inconsistent with this opinion.

Her eligibility will be determined as of her application to reinstatement under the child disability benefits provision following the death of her husband.

She is not entitled, as the Court now views it, based on the papers now before it, to child disability benefits after her marriage and up to the time of her subsequent re-application because in effect she acquiesced in the Government's position that she was not entitled to benefits under the child disability provisions after she married.

However, should the regulations and statutes indicate that the Court is wrong in this respect, this opinion should be considered dicta by the administrative agency involved.

This order will be stayed pending appeal in view of the proceedings in the Jobst case.

Is there anything else the parties wish in the way of finding of fact or law?

MR. JENSEN: I'm a little confused. The Court's order is that this case, the judgment in this case is stayed pending resolution of the Jobst appeal or this appeal?

THE COURT: It would be pending resolution of this appeal but if the Jobst case results in a reversal—in that case—while this appeal—

MR. KIRKLIN: Should the Government not appeal.

THE COURT: Well they will appeal, but should they not appeal, I don't know what the procedural impact would be—

MR. JENSEN: The Government is going to appeal.

I'm concerned that there might be a hiatus between the resolution of the Jobst appeal—

THE COURT: If the Jobst appeal is decided fairly to the Government and if in the interim you've appealed, I won't have any jurisdiction but you're free to advise whoever needs to be advised— I suppose the Supreme Court—that it's the intention of this Court, if there is a Jobst reversal and the case if then remanded to this Court for further consideration, to then dismiss the complaint on the basis of the Jobst appeal. That is to say, I don't find sufficient difference between this case and the Jobst case in the fact that the marriage has been terminated and I would not decide it on that basis. So if there is a reversal in Jobst, necessarily I'll reverse myself in this case.

MR. JENSEN: So we have a stay pending the outcome of the appeal of this case.

THE COURT: Pending the outcome of the appeal of this case.

MR. KIRKLIN: You say that there's been an acquiescence—

THE COURT: Well it's not been briefed and argued which is why I say it's dicta, but my intentions, based on the record I have now, is to reverse only as to the reapplication.

MR. KIRKLIN: She's asking for benefits back to '62. Both issues were decided by the Secretary that the marriage bar cut her off in '62 and she was not entitled to be restored in '69.

THE COURT: What's the Government's position on that? Should this be a reversal as to both matters?

MR. JENSEN: The Jobst opinion indicates that the statute is unconstitutional. At the moment it terminates benefits upon marriage. Plaintiff has a right to seek benefits retroactive to the time of that termination—

THE COURT: Well if that's the position, then I withdraw what I said and she would get retroactive benefits I suppose up to '62 depending on the administrative regulations. I really make no finding as to that.

MR. JENSEN: Would the Court entertain a motion later to amend the judgment if I find the law is to the contrary?

THE COURT: If it becomes necessary.

Is it sufficient and clear for our purposes?

MR. KIRKLIN: I think so.

THE COURT: I think somebody should submit an order. What I said constitutes the Court's finding on the facts and law.

* * *

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RUTH MCMAHON,

Plaintiff,

-against-

F. DAVID MATHEWS, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,

Defendant.

Civil Action No. 74-Civ. 540

JUDGMENT

Filed in Clerk's office U.S. Dist. Ct.,
Feb. 14, 1977

In the above-entitled action, the plaintiff with the permission of the Court having served and filed an amended and supplemental complaint, and a motion having been made by plaintiff for summary judgment, and the Court having heard argument and having considered the briefs and papers submitted by the parties, and a decision of the Court having been duly rendered orally on January 18, 1977 granting plaintiff's motion for summary judgment in order to provide consistent determinations by lower courts, it is hereby

ORDERED and ADJUDGED (1) that plaintiff's motion for summary judgment is granted; and it is further

ORDERED and ADJUDGED (2) that §§202(d)(1)(D), (d)(5), and (d)(6) of the Social Security Act, 42 U.S.C.

§§402(d)(1)(D), (d)(5), and (d)(6), are declared unconstitutional as applied in this case and insofar as said provisions terminate the child's disability insurance benefits of a beneficiary solely because she marries a totally disabled person who is not himself entitled to social security benefits and insofar as said provisions bar re-entitlement to those benefits upon the death of the beneficiary's spouse; and it is further

ORDERED and ADJUDGED (3) that the decision of the Secretary terminating the plaintiff's child's disability insurance benefits in 1962 upon her marriage and refusing to re-entitle her to benefits in 1969 upon the death of her spouse is reversed and the case is remanded to the Secretary with directions that plaintiff's child's disability insurance benefits be reinstated retroactive to their termination in May, 1962; and it is further

ORDERED and ADJUDGED (4) that this judgment is stayed pending the Secretary's appeal from said judgment to the United States Supreme Court.

Dated: Brooklyn, New York
February 11, 1977

/s/ Jack B. Weinstein

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RUTH MCMAHON,

Plaintiff,

-against-

JOSEPH CALIFANO, JR., AS SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Defendant.

Notice of Appeal

Civil Action
No. 74 C 540

NOTICE is hereby given that the defendant, JOSEPH CALIFANO, JR. as Secretary of the Department of Health, Education and Welfare, hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §§1252 and 2101, from the judgment entered in this action on February 14, 1977, by this Court holding Sections 202(d)(1)(D), (d)(5), and (d)(6) of the Social Security Act, 42 U.S.C. §§402(d)(1)(D), (d)(5) and (d)(6) to be unconstitutional as applied to the plaintiff in the above action.

Dated: Brooklyn, New York
March 14, 1977

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York, 11201

By: _____
J. CHRISTOPHER JENSEN
Assistant U.S. Attorney

TO:

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